

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 237

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT LEE MERRITT and WINNIE MERRITT, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT**

**SUPPLEMENTAL MEMORANDUM FOR THE
PETITIONER**

On October 12, 1964, the Court granted certiorari in *Paragon Jewel Coal Co. v. Commissioner*, No. 134, but did not act on the petition in this case, presumably intending to withhold action until *Paragon* is decided. The purpose of this memorandum is to point out that the result of the Court's action is to place the issue before the Court without an adverse party. In order to provide an adversary proceeding, we suggest that the Court also grant certiorari in this

case and consolidate it for argument with the *Paragon* case.

Respondents in this case are coal miners who, under oral contracts with Paragon, mine coal on lands owned or leased by Paragon and deliver the mined coal to Paragon at a price per ton fixed from time to time by Paragon. It is agreed by all that either the miners or Paragon, but not both, are entitled to percentage depletion deductions on the amounts paid by Paragon to the miners. The single issue in both No. 134 and this case is *which* party to the contracts is entitled to the depletion deductions. The cases were consolidated in the Tax Court and the court of appeals. The Tax Court gave the deduction to Paragon; the court of appeals, to the miners. The government supported Paragon's position in the court of appeals, and, when Paragon petitioned for certiorari in No. 134, we stated our agreement with it that the court of appeals' decision was wrong and ultimately joined in urging that the petition be granted. At the same time, we filed a petition in this case (*i.e.*, against the miners) conditioned upon the grant of certiorari in *Paragon*. As noted above, the Court, on October 12, 1964, granted the petition in *Paragon* but did not act on the petition in this case.

If the *Paragon* case is argued alone, the upshot, since the government agrees with Paragon, will be that both parties before the Court will be arguing for the same result. The only parties taking the opposite position are the miners who are the respondents in this case. In order that they may be heard,

and the Court have the benefit of a presentation of opposing views, it is respectfully suggested that the Court should also grant the petition in this case and consolidate the cases for argument. We are authorized to advise the Court that respondents concur in that suggestion.¹

The *Paragon* case was placed on the summary calendar, and a grant of the petition in this case would therefore require some enlargement of the time allowed for argument even if the cases were consolidated. As a party to both cases, however, the government is willing to waive any right to additional time and to accept a single half-hour as its allotment of time for argument of the consolidated cases.

Respectfully submitted.

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OCTOBER 1964.

¹ *Commissioner v. Cooper*, No. 262, this Term, in which we also filed a conditional petition for certiorari, involves the same question but a wholly separate transaction and different parties. The petition in that case may, therefore, appropriately be held to await the outcome of the *Paragon* case.